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FILED
DEC 16 1972
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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

NO. 72-448

BILLY WEST DASHER,

Petitioner,

v.

JOHN A. BLACKMON, Commissioner, State Department of Revenue, and Lowndes County, Georgia, and Frank S. Steele, Foreman of Lowndes County Grand Jury, September Term, 1970,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Georgia

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The decision of the Lowndes County Superior Court (App. of Petition) is unreported. The opinion of the Georgia Supreme Court (App. of Petition) is reported at 229 Ga. 289 (1972).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. Challenges to jurisdiction are set forth in Part I of the Argument of this brief.

QUESTION PRESENTED

Whether the action of a state grand jury, statutorily acting as an overseer of county government, in recommending a penalty against a county official for failure to perform his duties adequately, violates the due process of law requirement of the Fifth and Fourteenth Amendments to the Federal Constitution, where the official has notice and an opportunity to be heard before he is deprived of his property or unrestricted use of his property.

STATEMENT OF THE CASE

For several years successive grand juries of Lowndes County, Georgia, had been concerned with the large amount of delinquent and uncollected taxes owing to the county. Presentments were made regarding improved collection procedures, all of which were ignored by petitioner, the tax collector of the county. Finally, the September, 1970 grand jury invoked Ga. Laws 1884-85, p. 66 (Ga. Code § 92-5106) and imposed, *ex parte*, a forfeiture of commissions on petitioner for failure to perform his statutory duties in an adequate manner. Petitioner refused to pay and execution was issued against him by the State Revenue Commissioner pursuant to Ga. Code §§ 92-5501 and 92-5504.

Petitioner filed an equitable complaint and a motion to expunge seeking to enjoin collection of the penalty and to remove the grand jury presentment imposing the penalty from the court records. Petitioner also filed an affidavit of illegality to the execution issued against him. As permitted by Ga. Code § 92-5505, the latter pleading was filed before levy on petitioner's property. The action instituted by the affidavit of illegality is presently pending in Lowndes County Superior Court as Civil Action Number 2901.

In an order dated February 4, 1972 (App. of Petition), the trial court held the grand jury presentment to be void for two reasons. First, the court held petitioner to be a state official rather than a county official and thus a beneficiary of Ga. Code §§ 40-1617 and 89-9908. These statutes give state officials charged with criminal misfeasance or malfeasance in office the right to be served with a copy of the proposed indictment and to appear before the grand jury, with counsel, to present evidence before indictment. Second, the court held the language used by the grand jury to be unnecessary to the purpose of the presentment, outside of that body's authority, and thus required to be expunged from the court records. The trial court did not consider or decide any federal question, constitutional or otherwise.

The Georgia Supreme Court reversed the trial court, again neither considering nor deciding any federal question. (App. of Petition). The court made its holding on three bases. First, on a somewhat collateral issue, the court held the county not to be a proper party on jurisdictional grounds. Second, the court held that petitioner was a county official rather than a state official and thus not entitled to the benefits of Ga. Code §§ 40-1617 and 89-9908. Third, the court held the language of the presentment to be proper.

Petitioner vaguely and broadly set forth several federal constitutional complaints in his pleadings and also, almost as an aside, in his brief to the appellate court. However, neither the trial court nor the Georgia Supreme Court considered or ruled on these questions. This is the background with which petitioner asks this this Court to grant a writ of certiorari.

ARGUMENT

Grand juries in Georgia are empowered to perform certain supervisory functions over the operation of local government in the counties in which they serve.[1] The case *sub judice* involves the exercise by the grand jury of one county of its supervision over one county official. While the sanction imposed against petitioner is available to the grand juries of all 159 counties of Georgia and has been available at least since 1884, its imposition, as stated by petitioner in his brief, was unique. Petitioner thus admits that his questions are nonrecurring and unimportant to this Court.

Questions (b), (c) and (d) of the petition may be disposed of in summary fashion. Petitioner makes no argument concerning them in his brief, thus, if not abandoning them, at least revealing his own view as to their importance in this Court's decision whether or not to grant a writ of certiorari. Question (b) concerns solely trial court jurisdiction in Georgia, patently an area outside of federal review. Question (c) reveals the uniqueness of petitioner's case, without raising a federal question based on invidious discrimination. Question (d) is raised for the first time in any manner in petitioner's brief.

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[1] Ga. Code Ch. 59-3 enumerates several such functions. For example, the grand jury is authorized to:

a. inspect the books and records of certain county officials and make presentments on their findings, Ga. Code § 59-309;

b. inspect the county jails and make recommendations thereon, Ga. Code §59-314;

c. inspect public buildings and property, Ga. Code § 59-315.

I

NO SUBSTANTIAL FEDERAL QUESTION WAS PROPERLY RAISED IN THE STATE COURT PROCEEDINGS.

As admitted by petitioner and shown in the opinions contained in the Appendix to the Petition, neither the trial court nor the Georgia Supreme Court considered or ruled on the questions raised by petitioner before this Court. Failure to properly raise these issues before the State Courts denies jurisdiction to this Court under 28 U.S.C. § 1257.

Even assuming, *arguendo*, that petitioner properly raised the federal questions in the trial court, the trial court, in fact, ruled for petitioner based on nonfederal grounds. It would appear to be uncontroverted that had those grounds been upheld as a matter of state law, the decision would have been based on nonfederal grounds adequate to support the judgment.

In any event, the questions were not properly raised in the Georgia Supreme Court. This requires denial of the writ. See, *Beck v. Washington*, 369 U.S. 541 (1962). The Georgia Supreme Court does not have jurisdiction to pass on constitutional questions unless they are both properly raised in and distinctly decided by the lower court. See, e.g., *In re Boult*, 227 Ga. 564 (1971). Rule 23(1)(f) of this Court places the burden on the petitioner to show that failure of the state court to rule is not based upon improper presentation of the question to it. Petitioner has not carried this burden.

It is uncontroverted that the questions petitioner poses to this Court have not been decided by the Georgia Supreme Court. This Court should decline to issue a

writ of certiorari on questions not properly presented to and passed upon by the Georgia Supreme Court.

II

THE PROCEEDING AGAINST PETITIONER DID NOT DENY DUE PROCESS OF LAW TO HIM.

Petitioner complains that the imposition of the penalty against him by the grand jury violates his right to due process of law in that his property is being taken without prior notice or an opportunity to be heard. The decisions of this Court which petitioner cites in support of his theory are inapposite to the proceedings involved in the case at bar.

The statute under which the grand jury acted provides, *inter alia:*

> ". . . the tax collector so violating shall forfeit all or such part of his commission as the grand jury of the county shall *recommend*. . . ." (Emphasis supplied.) Ga. Code § 92-5106

At this point in the proceeding no deprivation of property or rights in property occurred. The penalty recommended by the grand jury was not self-executing.

No deprivation of property or rights in property could occur until the penalty was collected by the State Revenue Commissioner through execution and levy. The Commissioner issued execution against petitioner. Petitioner filed an affidavit of illegality to the execution,[2]

[2] Ordinarily, an affidavit of illegality challenging the underlying claim behind a levy may be filed only *after* levy. See, Ga. Code § 39-1001. In petitioner's instance the affidavit of illegality was permitted to be, and was, filed *before* levy. See, Ga. Code § 92-5505.

thus joining issue as to the underlying merits of the action of the grand jury. Petitioner thus has had notice and his opportunity to be heard before taking of his property awaits him in Lowndes Superior Court in Civil Action Number 2901.

The decisions of this Court require no more elements of due process than have been afforded to petitioner in the proceedings at issue. As was recently stated by a member of this Court:

> ". . . due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use." (Emphasis in original) *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343 (1969) (Harlan J., concurring opinion).

The required notice and hearing are, as has been shown, provided to the petitioner.

CONCLUSION

For the foregoing reasons it is respectively submitted that this petition for a writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of December, 1972, three copies of the Brief for Respondents in Opposition were mailed, postage prepaid, to James T. Bennett, Jr., Bennett, Saliba & Yancey, P. O. Box 1685, Valdosta, Georgia 31601, Counsel for Petitioner. I further certify that all parties required to be served have been served.

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